No. 89-628
No. 89-640

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-628

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,
Petitioners,

vs.

NATIONAL WILDLIFE FEDERATION,
Respondent.

AND

No. 89-640

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

vs.

NATIONAL WILDLIFE FEDERATION,
Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN MINING CONGRESS

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INTRODUCTION

On July 15, 1985, the National Wildlife Federation ("NWF") filed a suit against the United States Department of the Interior complaining that the Bureau of Land Management ("BLM") was improperly terminating a multitude

of land classification and withdrawal orders on lands administered by the BLM, and claiming that the termination of these orders would result in disposal or development of vast acreages of public lands. NWF asked for immediate injunctive relief to (1) freeze land classifications and withdrawals as of their status on January 1, 1981 (some four and one-half years earlier) and (2) enjoin the BLM from taking actions inconsistent with the then existing classifications and withdrawals. In essence, NWF seeks to reorder an entire government program.[1]

Battlelines were drawn immediately around the standing issue. In support of its standing to bring the suit, NWF submitted only the thinnest of evidence and, on the basis of this, sought to prohibit uses on more than 180,000,000 acres of federal public lands. The District Court initially upheld the evidence of standing as sufficient to survive a motion to dismiss and granted the preliminary injunction.[2]

On appeal, the Court of Appeals, in a split decision, upheld the District Court's finding that enough had been alleged by NWF as to its standing to survive the motion to dismiss (*Burford I* at 312–314; App. 48a–57a)[3] and that the

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[1] *National Wildlife Federation v. Burford*, 676 F. Supp. 271 (D.D.C. 1985) (App. 119a–136a). See also *National Wildlife Federation v. Burford*, 676 F. Supp. 280 (D.D.C. 1986) (App. 137a–150a).

[2] *National Wildlife Federation v. Burford*, 676 F. Supp. 271, *supra*, at 277 and 279 (App. 130a and 136a).

[3] *"Burford I"*, the first opinion of the Court of Appeals in this case, is reported as *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (App. 38a–115a). A vigorous dissent by Circuit Judge Williams in *Burford I* criticized the granting of the preliminary injunction on the weak proofs offered in support of standing:

> The majority today upholds a district judge's self-appointment as *de facto* Secretary of the Interior over 180 million acres – nearly one-fourth of all federal lands and more than half of the public lands managed by the Bureau of Land Management ("BLM"). It does so without a showing that the BLM breached any legal requirement as to a single parcel of land. Even assuming such a breach, the record is barren of any hint that it was material or likely to harm plaintiffs' interests – much less irreparably. Unable to sanction such a judicial usurpation of power, I dissent.

835 F.2d at 327 (App. 85a).

District Court did not abuse its discretion in granting the preliminary injunction (*Burford I* at 327; App. 84a–85a).[4] Later, the District Court undertook consideration of the case on cross-motions for summary judgment and granted judgment against NWF on the basis of lack of standing.[5] The Court of Appeals reversed this judgment on the grounds that it had already found sufficient standing in *Burford I* and that was now the law of the case. (*Burford II* at 432–433; App. 18a–20a).[6] It is from *Burford II* that the present Petitions for Writ of Certiorari were filed.

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[4] The Court of Appeals denied the motion for rehearing urged after its *Burford I* decision in *National Wildlife Federation v. Burford*, 844 F.2d 889 (D.C. Cir. 1988). There the Court of Appeals noted (at page 889; App. 117a–118a; emphasis added):

> It has been over two years since the preliminary injunction was issued. As we stated in our opinion, "[t]his is a serious case with serious implications." 835 F.2d at 327. We noted then, and continue to believe, that some of the criticisms of the breadth and scope of the preliminary injunction offered in the vigorous dissent are not without force. *In addition, we are aware that the district court injunction has placed on "hold" for over two years a complex governmental effort to review and adjust its classifications of vast tracts of land. It is also beyond dispute that countless parties are affected by the uncertainties associated with the unsettled status of these lands.* For these reasons, we believe that the disposition of these millions of acres should not continue to rest any longer than necessary on the foundation of a preliminary injunction which was entered on consideration of the brief affidavits and cursory materials presented to the court below.

[5] *National Wildlife Federation v. Burford*, 699 F. Supp. 327 (D.D.C. 1988) (App. 26a–37a).

[6] *"Burford II,"* the Court of Appeals opinion of which review is

Amicus Curiae American Mining Congress, with the permission of all parties in both petition dockets, files this Brief in support of both of those Petitions.

INTERESTS OF *AMICUS CURIAE*

The American Mining Congress is a non-profit corporation of the State of Colorado, which serves as a trade association composed of (1) producers of most of America's metals, coal, and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining industry.

Congress has repeatedly pronounced as a national policy that the domestic mining industry is essential to the country's security and prosperity, 30 U.S.C. 21a, 1602–1605, 1801(a), and that the public lands should be managed in a manner to implement that policy, 43 U.S.C. 1701(a)(12). It appears to *Amicus Curiae* that NWF harbors a different view, that mining activity on public lands is contrary to the nation's interests. That view certainly was the essence of NWF's demand for the preliminary injunction.[7]

The 180,000,000 acres of land which is subject to this suit constitutes more than one-half of all lands administered by the BLM and forty-four percent of all lands owned by the federal government in the western United States, excluding Hawaii and Alaska. Most of the known domestic resources of metallic minerals, other than iron, are situated in the West and there is a strong probability that the public land areas of the West hold greater promise for future mineral discoveries than any other region. Public Land Law

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sought by these Petitions, is reported as *National Wildlife Federation v. Burford*, 878 F.2d 422 (D.C. Cir. 1989) (App. 1a–25a).

[7] See *National Wildlife Federation v. Burford*, 676 F. Supp. 271, *supra*, at 279 (App. 135a).

Review Commission, *One Third of the Nation's Land*, 121, 122 (1970).

Already the mining industry's mineral exploration activities in the western United States have been affected by this case, just by virtue of the suit having been filed and then by the issuance of the preliminary injunction. If NWF ultimately prevails in imposing its views on the BLM, the public lands available for mineral supply will be reduced drastically. The mining industry (and the resulting benefits to the prosperity and security of the nation) is largely dependent upon public land mineral resources. Thus, *Amicus Curiae* is keenly interested in the outcome of this case.

SUMMARY OF ARGUMENT

The Court should grant certiorari because the *Burford II* opinion of the Court of Appeals, in upholding NWF's claim of standing, ignores the constitutional limits on the role of the federal judiciary. The essence of this dispute is whether NWF should be permitted to use the federal courts to mold the national policy to reflect NWF's privately held opinion that all of the public lands which are subject to this suit should be protected from mining. This is a political question for Congress to decide, not a "case or controversy" for the courts to decide. If NWF wishes to proceed with its quest, it should do so by bringing its "argument" to Congress and the executive branch of the government. Accordingly, *Amicus Curiae* respectfully submits, this suit is barred by considerations more fundamental than the issue of standing. If this Court agrees that NWF is asking the courts to intrude on the representative branches of government, then it is not necessary to reach the question of whether NWF "lined up enough ducks" on the standing issue.

Furthermore, this Court will find, as is pointed out in the briefs filed by the Petitioners, that the standing showings offered by NWF are defective under even the most liberal cases.

And, finally, to resolve the concerns of NWF, the District Court will be forced to review and administer an entire governmental program rather than to carry out a proper function of the courts: determining the propriety of a particular federal agency action. NWF's goal in forcing the program review is to impose on the country its narrow view of the public good. The very fact that this suit was filed has disrupted the BLM's conduct of its business, as well as the business of third parties, such as those in the mining industry, which cannot operate without stability in the government's programs and policies concerning public lands. Review of federal agency programs is not the proper use of the federal judiciary.

ARGUMENT

A. NWF's Suit Should be Dismissed as Not Justiciable Because it Asks the Court to Ignore the Separation of Powers Doctrine.

No matter what is thought of NWF's claims to have satisfied the required showings for standing and no matter what is thought of the minimal requirements to establish standing under cases like *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), and *Defenders of Wildlife, Friends of Animals v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), this case is outside of the universe of cases that may properly be undertaken by the federal courts. This case involves an entire governmental program. Congress established that program in 1976 by requiring the Secretary of the Interior to review the withdrawals of the public lands at question in this case to determine which withdrawals should be continued or revoked, and authorized the Secretary to terminate those administratively created withdrawals which are no longer needed. Congress placed the deadline for the completion of this withdrawal review program at October 22, 1991. 43 U.S.C. 1714(l).

This withdrawal review program is a political matter, not a justiciable question. The separation of powers doctrine requires the federal courts to limit their authority to justiciable questions and keep out of the political aspects of government.[8] *Allen v. Wright*, 468 U.S. 737 (1984).

It is submitted that the separation of powers doctrine is not a standing concept.[9] Standing focuses on whether the particular plaintiff properly brings a case within the judicial limits of Article III. The separation of powers doctrine, though also rooted in Article III, focuses on the justiciability of the issue. If, in order to satisfy the plaintiff, the federal court must encroach upon the realm of the legislative and/or executive branches of the government, then the separation of powers doctrine bars the suit. *Allen v. Wright, supra*, at 759. Whether it is labelled a question of standing or not, the essential and underlying inquiry is, under our system of the separation of powers, should the courts undertake the case.

In *Allen v. Wright, supra*, 759–60, this Court stated:

> The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that the respondents' alleged injury "fairly can be traced to the challenged action". . . . That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of the law, but the particular programs agencies establish to carry out their legal obligations. *Such suits, even when premised on allegations of several instances of violations of*

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[8] This issue was raised before the Court of Appeals, but is not squarely addressed in the *Burford II* decision.

[9] An analysis of this principle is provided in Coyle, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 Cal. L. Rev. 1061, 1091–1093 (1988).

> *the law, are rarely if ever appropriate for federal-court adjudication.*

(Emphasis added.)

The very situation this Court in *Allen* warned against is the situation in this case. NWF has not complained of a specific violation of law which has in fact harmed one of its members. Instead, though complaining that there are general violations of the law, NWF in reality wants to halt an entire governmental program.

In language which is verbatim applicable to this case, this Court in *Allen* said:

> When transported into the Art III context, [the principle that government be ~~granted~~ the widest latitude in the dispatch of its own internal affairs], grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. *The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the laws be faithfully executed."* U.S. Const., Art. II, § 3. *We could not recognize respondents' standing in this case without running afoul of that structural principle.*

468 U.S. at 761; emphasis added.

The intrusion upon the separation of powers has been extended further by Congress itself broadening the role of the judiciary by attempting to grant universal standing in

some environmental legislation, such as in the Clean Air Act, 42 U.S.C. 7607(d), and in the Clean Water Act, 33 U.S.C. 1365. The following observations have been made about Congress purporting to grant standing beyond the bounds of the Constitution:

> Justice Scalia believes that standing is ultimately related to separation of powers concerns. The power of the Congress to expand standing is, therefore, inescapably limited. In Scalia's view, congressional approval, express or implied, to expanding standing "cannot validate judicial disregard" for the boundaries that exist between branches of government.
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> A universal grant of standing, even though an "acquiescence" of Congress to judicial intervention, forces courts to hear the claims of the majority because plaintiffs need not allege palpable injuries that set themselves apart from the general public. . . . The democratic process that inheres in the executive and legislative branches, and not the undemocratic process that inheres in the courts, should resolve and protect the interests of "all-inclusive" classes of citizens.[10]

In this case, NWF is not suing on the basis of legislation where Congress made a universal grant of standing. It should be readily apparent, therefore, that if special interest

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[10] Alpert, *Citizen Suits Under the Clean Air Act: Universal Standing For The Uninjured Private Attorney General?*, 16 Boston College Environmental Affairs L. Rev. 283, 304–305 (1988–1989); footnotes omitted; referring to Justice Scalia's *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983).

groups should not be allowed to distort the judiciary's role even where Congress has "authorized" it by granting universal standing, then special interest groups should certainly not be allowed to do so by cases such as this one without congressional encouragement.

More harm is done by allowing actions such as NWF's suit than simply an injudicious stepping on the toes of other branches of government. It has been observed that when special interest groups, such as NWF, succeed in convincing a court to undertake review of a governmental program, they obtain an inappropriate advantage in terms of greater clout and more attention than is warranted vis-a-vis all the other interests which should be considered in the formulation of public policy.[11] This is because special interest advocates are not primarily concerned with presenting all of the issues for the court to decide. Instead, they are primarily concerned, like anyone else contemplating a lawsuit, with presenting only the issues which will allow them to prevail in the matter under dispute. The very fact the special interest group has convinced the court to take the case indicates that group's notion of public policy has caught the court's attention and, perhaps, the court has allowed itself to become a vehicle or even a champion of the special interest group's view of public policy. (Jeremy Rabkin, *Judicial Compulsions: How Public Law Distorts Public Policy*, pp. 63–64, (1989).)[12] Rabkin states that permitting the special interest group lawsuits against administrative agencies is "essentially a means by which courts grant particular private advocates privileged claims on the conduct of public policy." Rabkin, *supra*, at 64.[13]

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[11] The proper forum for special interest groups to demand attention for their agenda is through the more deliberate and democratic legislature.

[12] This Court has admonished the federal judiciary to refrain from such judicial activism. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

[13] In his dissent in *Burford I*, Circuit Judge Williams charged that

Further, Rabkin submits, when special interest groups are able to intimidate administrative agencies with threats of lawsuits, then the administrative agencies are inordinately influenced in their policy decisions by the promptings and complaints of these advocacy groups. And, if lawsuits proceed, then the advocacy groups can invoke legalistic rationales to protect their preferred policies from reconsideration or adjustment over time. (Rabkin, at 63–64 and 270.)

Amicus Curiae submits that the concerns expressed by Rabkin are very real. If NWF is successful in proceeding with this case, then the ability of the BLM to make judgments based on the many relevant policy considerations will be limited, with undue attention being given to NWF's view. The national policy to manage public lands in a manner which fosters the domestic mining industry is, thus, thwarted.

The existence of cases in which claims such as NWF's have been allowed to proceed without strict insistence on meeting the constitutional and traditional requirements for a "case or controversy"[14] does not force this Court or any federal court to further extend that ill-advised practice to the extent sought by NWF in this case.[15] Special interest

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undue influence for the environmentalists' agenda was the very result in this case:

> The injunction . . . makes no effort to minimize the *aggregate* harm to the public interests in both environmental preservation and alternative activities: the district court has allowed environmental interests, however weak and however trivially they may be at risk as to particular tracts, to sweep the other interests off the board.

835 F.2d at 340 (App. 114a–115a).

[14] For example, the *United States v. SCRAP* case, *supra*.

[15] Some legal commentators have observed that the courts are taking a more critical look at standing cases. For example, see Alpert, *supra*, at 305.

groups may still, and properly should, pursue their agenda in the political realm of government.

This case exemplifies a third mischief that springs from involving the courts in the administration of governmental programs. Here, the already overburdened judiciary is being asked to assume an enormous and time-consuming task which, constitutionally, the judiciary should avoid. The task NWF asked the District Court to undertake was awesome. NWF's goal was not to challenge indentified "wrongs," but, rather, was to have the Court perform the work of the BLM while wearing NWF-supplied blinders. Instead of selecting one or even several BLM classification or withdrawal decisions on land which it could precisely locate and for which it might produce an injured member who recreated on that land, NWF challenged the entire withdrawal review program by including hundreds of Federal Register notices of BLM actions (NWF's Amended Complaint, paragraph 18) and neither precisely located them for the Court (*Burford I* at 329 and 337; App. 89a–90a and 107a–108a), nor produced members who could claim injury. As the case progressed, NWF was forced to concede that some of the listed actions were environment enhancing even in NWF's view. (*Burford I* at 337; App. 108a). And as pointed out in the briefs filed by the Petitioners, the District Court had monumental difficulties during the period the preliminary injunction was in effect.[16]

And there is a fourth mischief in these suits that is particularly apparent in this case. Allowing an entire program to be challenged reduces, if not nullifies, the ability

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[16] As noted at pages 7–8 of the Petition filed by the federal Petitioners in Docket 89–640, several modifications of the preliminary injunction were necessitated to limit its original scope. In at least one instance, NWF itself was constrained to ask for relief. Congress, at the behest of affected parties, legislated other limits on the effect of the preliminary injunction.

of third parties to conduct their business with the government. The mining industry is dependent on its statutory right to explore for and produce minerals on public lands. Until the industry knows reliably what will become of the BLM's classification and withdrawal review programs, the mining industry cannot risk the huge monetary investments necessary to conduct mining activities. If, as Congress has declared, the national policy favors an orderly domestic mining program, then the mining industry must be allowed to rely on governmental programs. (See the statement of the Court of Appeals quoted at footnote 4, *supra*, wherein that court recognized the disruption caused to the ability of third parties to conduct business.)

B. NWF's Suit Fails Under the Most Liberal of Standing Cases.

Standing jurisprudence is a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief. *National Wildlife Federation v. Hodel*, 839 F.2d 694, 703-704 (D.C. Cir. 1988). The courts have developed guidelines for the case-by-case testing of standing issues. First, the suit must meet the "case or controversy" requirement of Article III of the Constitution. *Warth v. Seldin*, 422 U.S. 490 (1975); *NWF v. Hodel, supra.* Second, the suit must survive self-imposed "prudential limits" on the courts' powers. *Warth, supra; NWF v. Hodel, supra.*

Even though these same constitutional and prudential tests underlie virtually all the many federal court pronouncements on standing, the pronouncements are hard to reconcile. But, *Amicus Curiae* suggests, there is no need in this case to attempt to reconcile the "conservative" standing cases with the "liberal" ones. The Petitioners have pointed out in their briefs that NWF's showing of standing failed to meet even the most liberal of the standing decisions.

Amicus Curiae, however, wishes to bring to this Court's attention that there is a case, also decided by the

District of Columbia Circuit, which is substantively irreconcilable with the present case. *See Wilderness Society v. Griles,* 824 F.2d 4 (D.C. Cir. 1987). That case involved a challenge by the Wilderness Society and the Sierra Club to a BLM policy decision not to charge submerged lands against the grant of acreage entitlements for Alaska and Alaskan natives. In fact, *Griles* was decided by some of the same Circuit Judges who decided *Burford II.* In the *Griles* case, however, it was held that affidavits of Society members, in which it was claimed that the members visited federal lands throughout the State of Alaska, were *insufficient* to support standing. The Court of Appeals reasoned that members failed to name specific lands they intended to visit which lands would be taken out of federal ownership by the challenged BLM policy.

The very same flaw in standing proof defeats this case. NWF's member affidavits claimed nothing more specific than recreating "in the vicinity of" only some of the enormous expanses of federal land affected by this suit. They did not point to specific tracts which would be opened to other users, thereby injuring the members' enjoyment of the environment undisturbed. This Court is often asked to grant certiorari to resolve a conflict in decisions between Circuits. Here, certiorari should be granted to resolve a conflict within a Circuit.

Despite all the procedural entanglements and problems over what standard of review was to be applied at any particular stage of this case, what happened here is relatively simple: NWF tested the limits of a claim to standing. The District Court found that NWF pushed too far. The Court of Appeals, misled by a notion of law of the case, reversed. Unfortunately, in addition to announcing that the appeal was decided on the basis of law of the case, the Court of Appeals, in a published opinion, made lengthy comments to the effect that the Court would countenance standing proofs even as thin as NWF's. Even if these comments are viewed as *dicta,* they will necessarily confuse the law of standing. The wisdom of this Court is called upon to instruct

the Court of Appeals, and, indeed, all federal courts, that the courts of this nation should not be in the business of reviewing entire public programs, especially where the activities claimed by the plaintiff's members are located no more precisely than "in the vicinity" of a few of the huge tracts of federal land they seek to preserve.

The vastness of the public lands requires that direction for their management be provided initially by broad programs, such as the withdrawal review program, to be implemented by individual actions on specific land areas. If a party is injured by such a specific action, that party may have standing to seek redress in the courts for that action, but not for the entire program guiding other actions which do not affect that party.

CONCLUSION

The Petitions for Writ of Certiorari should be granted.

Respectfully submitted,

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